

1982 Ky. Op. Atty. Gen. 2-527, Ky. OAG 82-502, 1982 WL 177273 (Ky.A.G.)

\*1 Office of the Attorney General  
Commonwealth of Kentucky

OAG 82-502

September 15, 1982

Hon. D. Jeff Choate  
Attorney at Law  
301 Cumberland Street  
P. O. Box 213  
Albany, Kentucky 42602

Dear Mr. Choate:

This is in response to your letter of September 9, 1982 in which you initially raise the following question:

“Is a bank which is federally insured, exempt from occupational taxes within a fifth class city?”

State and national banks are exempt from city occupational and license taxes under the provisions of [KRS 92.300\(2\)](#) which reads as follows:

“No city of the second to sixth class or urban county government may impose or collect any license tax upon any bank, trust company, combined bank and trust company, or trust, banking and title insurance company organized and doing business in this state, any savings and loan association whether state or federally chartered, or upon income received by members of the Kentucky national guard for active duty training, unit training assemblies and annual field training.”

We are also enclosing a copy of OAG 67-130 which responds to your question in more detail.

Your second question is as follows: “Is there any conflict if an individual holds both the position of City Attorney and that of Trial Commissioner of the District Court?”

The office of city attorney is a municipal office provided it is so established by ordinance under the terms of [KRS 83A.080](#). As you probably know, [KRS 69.580](#) which created the office of city attorney was repealed in 1980 when the new municipal code was enacted. On the other hand, the city may under its general home rule authority, namely [KRS 82.082](#), establish the position as a form of city employment, or as an alternative, authorize the execution of a personal service contract to employ the services of an attorney on an hourly basis. See OAG 81-403, copy attached. On the other hand, the office of trial commissioner is a state office pursuant to the terms of [KRS 24A.100](#) and the Judicial Article itself. See OAG 77-744, 77-101 and 77-661.

[Section 165 of the Constitution](#) and [KRS 61.080](#) prohibit a state officer from holding a municipal office or employment. Thus, if the city has either established a position of legal advisor as a form of city employment or created the office of city attorney, no one could hold at the same time the office of trial commissioner and the office

of city attorney or city employment without violating the referred to sections of the Constitution and statute.

However, if an attorney is employed on a personal service contract basis, we have held that he would be considered an independent contractor and there would be no Constitutional or statutory objection to his serving as trial commissioner of the district court. See [Hopson v. Howard, Ky., 367 S.W.2d 249 \(1963\)](#).

Your third and last question is as follows:

“After the City Council in a fifth class city has appropriated monies for the salaries of their council members, must these be paid to council members who refuse such payment? If payment is refused and salaries are not paid, must there be payment of any type of state withholding taxes, or income taxes?”

\*2 Our response to your question would be in the affirmative. [KRS 83A.070](#) requires that the compensation for members of the city legislative body be fixed not later than the first Monday in May in the year in which they are elected and such sum cannot be changed during their term of office. See also [Sections 161 and 235 of the Kentucky Constitution](#). This means in effect that once the compensation is fixed by ordinance as it is required to be for members of the legislature it must be paid to those members. After they receive their salary, they may, of course, dispose of it in any manner that they see fit and could even donate it back to the city. It is a general rule that an agreement by an officer to receive less than the fixed salary of the office to which he is elected or appointed, is void against public policy. [Town of Nortonville v. Woodward, 191 Ky. 730, 231 S.W. 224 \(1921\)](#) and [City of Louisville v. Thomas, 257 Ky. 540, 78 S.W.2d 767 \(1935\)](#).

This rule was also expressed in the case of [Franklin County v. Graham, 305 Ky. 710, 205 S.W.2d 505 \(1947\)](#) to the effect that:

“This prohibition exists clearly for a purpose, and the reason underlying the rule is quite obvious. To permit an office to become the subject of unworthy motives and political finagling would be violently against public policy and would strike at the very heart of sound governmental administration.”

We also might call your attention to [Beauchamp v. Snider, 170 Ky. 220, 185 S.W. 868 \(1916\)](#) in which the court declared that a public officer's salary cannot be diminished after his election or appointment.

As we said in the beginning, there is nothing to prevent the councilman upon receiving his compensation to then dispose of it in any manner he sees fit. However, he must first actually and legally receive it.

Concerning the question of tax possible implication, we can only say that such is a matter between the officer and the taxing authorities; federal, state, and local.

Sincerely,  
Steven L. Beshear  
Attorney General

Walter C. Herdman  
Asst. Deputy Attorney General

1982 Ky. Op. Atty. Gen. 2-527, Ky. OAG 82-502, 1982 WL 177273 (Ky.A.G.)

END OF DOCUMENT